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No. 88-1595

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

KAISER ALUMINUM & CHEMICAL CORPORATION and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

JOSEPH A. BONJORNO, LORRAINE KERR
(Executrix of the Will of GEORGE M. KERR, JR.),
and BARBARA K. CLISBY,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

Richard P. McElroy
Counsel of Record
Ann B. Laupheimer

BLANK, ROME, COMISKY
& MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, PA 19103
(215) 569-5500

Attorneys for Petitioners

October 2, 1989

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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ARGUMENT

Plaintiffs have not refuted Kaiser's showing that the decision of the Court of Appeals, applying amended §1961 retroactively to a judgment entered prior to its effective date, was wrong and should be reversed.

The Court of Appeals relied on the incorrect presumption that current law applies retroactively rather than adhering to the traditional rule disfavoring retroactive lawmaking. The Court of Appeals also failed to recognize that this case fits within all three of the exceptions to *Bradley v. Richmond School Board,* 416 U.S. 696 (1974). Finally, the Court of Appeals measured postjudgment interest from the date of a *verdict,* in contravention of the plain language of the federal postjudgment interest statute which requires that interest accrue from the "date of entry of the *judgment.*" 28 U.S.C. §1961.[1]

A. The Outcome Of This Case Does Not Turn On The Identification Of "Vested Property Rights".

Plaintiffs wrongly argue that because application of amended §1961 in this case does not impair or destroy "vested property rights," it is not retroactive. On the contrary, the concept of retroactivity is much broader than plaintiffs suggest and does not require that "vested rights" be impaired. In fact, neither the concept of "vested rights," nor the question of when rights "vest" is relevant in this case, where Kaiser simply asks the Court to construe a statute and has not raised a constitutional challenge to application of the statute.

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1. Emphasis supplied throughout, unless otherwise indicated.

1. Application Of Amended §1961 To A Judgment Entered Prior To Its Effective Date Gives The Statute Retroactive Effect.

Application of the 1982 amendment to §1961 to the 1981 judgment[2] entered in this case is a retroactive application of the statute, regardless of whether Kaiser's rights were "vested" or "unvested" on the effective date of the statute. By raising the concept of "vested rights" and making it the constant refrain throughout their brief[3], plaintiffs are attempting to restrict the definition of a retroactive law far beyond its common and accepted meaning.

Justice Story, in a frequently-cited definition of retroactive laws, explained that "every statute, which takes away or impairs vested rights acquired under existing law, *or* creates a new obligation, imposes a new duty, *or* attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective . . ." *Society for the Propagation of the Gospel v. Wheeler,* 22 Fed. Cas. 756, 2 Gall. C.C. 105, 139 (C.C.N.H. 1814). *See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle Of Jurisprudence,* 20 Minn. L. Rev. 775, 782 (1936). One commentator explained that "[a] retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Hochman, *The Supreme Court And The Constitutionality Of Retroactive Legislation,* 73 Harv. L. Rev. 692, 692 (1960). Another commentator found three meanings to the term "retroactive law":

2. Plaintiffs continually misstate that this case involves an August 1979 judgment. The 1979 judgment was *not* for $9,567,939 and was vacated and never reinstated.

3. The words "vest," "vested," or "vesting" appear *53 times* in plaintiffs' 50-page brief.

> One is that a law is retroactive if it extinguishes or impairs legal rights already acquired by the individual under the laws previously existing. . . . Another meaning is that a law is retroactive if it assumes to give effect to a past event, in order to create a present right or duty. And a third is that a law is retroactive when it assumes to give to a past event the effect of creating rights and duties *ab initio,* or as of some time prior to the retroactive law.

Comment, *Retroactive Laws And Vested Rights,* 5 Tex. L. Rev. 231, 232 (1927).

According to any one of these formulations, the holding of the Court below – that Kaiser's obligation to pay postjudgment interest on a judgment entered in *1981* was governed by a statute passed in *1982* – constituted a retroactive application of that statute.

2. "Vestedness" Is Only Relevant In The Context Of A Constitutional Challenge To A Retroactive Law.

When a party challenges the *constitutionality* of a retroactive statute,[4] the court examines the effect retroactive application will have on the parties, their rights, duties and obligations, including, in some instances, whether the rights they claim are "vested". *See* Hochman, *supra,* at 696 ("The traditional principle invoked in determining the constitutionality of retrospective legislation is that a statute may not abrogate 'vested rights' "); Sand, *Sutherland Statutory Construction* §41.06 (4th ed. 1986). Depending on the outcome of that evaluation, the court may find that the statute is unconstitutional under the Due Process Clause or one of

4. This might occur either when the law was expressly retroactive, or where the court has construed it and found that the legislature intended that it be applied retroactively. *See, e.g., United States v. Security Indust. Bank,* 459 U.S. 70 (1982) (illustrating this two-prong approach and avoiding constitutional prong by construing the statute prospectively).

the specific constitutional provisions designed to eliminate unfairness of this kind. *See* U.S. Const. art. 1, §9, cl. 3; *id.* §10, cl. 1 (*ex post facto* laws, bills of attainder, impairment of contracts).

This Court in *Weaver v. Graham,* 450 U.S. 24 (1981), explained that the "vestedness" concept applies only in the context of a constitutional challenge to a statute brought under the Due Process or Contracts Clauses. The Court in *Weaver* addressed a claim by a Florida prisoner that a state statute violated the prohibitions against *ex post facto* laws in the United States and Florida Constitutions. The state statute in place on both the date of the offense and the date of sentencing provided a formula for deducting gain-time credits from the sentences of certain prisoners. In 1978, two years after the petitioner's sentencing, Florida enacted a statute changing the formula for computing monthly gain-time deductions. Florida applied the new statute "not only to prisoners sentenced for crimes committed since its enactment in 1978, but also to all other prisoners, including petitioner, whose offenses took place before that date." *Id.* at 27. The prisoner sought a writ of *habeas corpus* from the Supreme Court of Florida, which was denied. The state court "reasoned that 'gain time allowance is an act of grace rather than *a vested right* and may be withdrawn, modified, or denied.'" *Id.* at 28 (citing *Harris v. Wainwright,* 376 So.2d 855, 856 (1979)).

This Court reversed. In an Opinion authored by Justice Marshall, the Court explained that there are two "critical elements" of an invalid *ex post facto* law:

> . . . it must be *retrospective,* that is, *it must apply to events occurring before its enactment,* and it must disadvantage the offender affected by it.

Id. at 29. The Court *rejected* the Supreme Court of Florida's requirement that the law impair vested rights. Justice Marshall explained the limited significance of

vested rights even in the constitutional setting:

> *Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements.*

Id. at 29-30.

Every case cited by plaintiffs as support for their position that Kaiser must identify a "vested right" deals with the *constitutionality* of a retroactive change of law. *See Funkhouser v. J.B. Preston Co.,* 290 U.S. 163, 167-68 (1933); *Morley v. Lake Shore & M.S. Ry. Co.,* 146 U.S. 162, 168-69 (1892); *Missouri & Ark. Lumber & Mining Co. v. Greenwood Dist. of Sebastian County,* 249 U.S. 170, 172-73 (1919). These cases are not relevant here. The Supreme Court did not evaluate whether the statutes at issue were properly applied. In *Funkhouser,* the statute was *expressly retroactive.* 290 U.S. at 164 n.1. In both *Morley* and *Missouri & Ark. Lumber,* the Supreme Court accepted the retroactive construction of state statutes by the highest courts of New York and Arkansas.

In this case, where Kaiser has asked the Court to construe this federal postjudgment interest statute, and where Kaiser has not raised a constitutional challenge to amended §1961, the presence or absence of "vested rights" is absolutely irrelevant.[5] According to this

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5. Even if Kaiser had mounted a constitutional attack on the retroactive application of amended §1961, plaintiffs' reliance on the concept of "vested rights" would be misplaced. As one commentator observed, "it has long been recognized that the term 'vested right' is conclusory — a right is vested when it has been so far perfected that it cannot be taken away by statute. More discerning commentators and judges have suggested that *the true test of the constitutionality of a retrospective law is whether a party has changed his position in reliance upon the existing law, or whether the retrospective act gives effect to or defeats the reasonable expectations of the parties.*" Hochman, *supra* at 696. It is clear that Kaiser reasonably relied on interest running at the state law rate in making

Court's reasoning in *Weaver*, retroactivity requires only that a law "apply to events occurring before its enactment. . . ." 450 U.S. at 29.

3. Plaintiffs' "Vesting" Analysis Was Properly Rejected By The District Court As "Specious".

Before the district court, plaintiffs also denied that retroactivity was involved, stating that the "*issue is not one of retroactive application of the statute*." Appendix in Court of Appeals, Nos. 88-1318, 88-1396 at 589a. Rather, plaintiffs advanced what they termed the "vesting analysis". They claimed that "the issue is one of current interpretation and application of a statute that contemplates a retrospective award of interest going forward from an earlier date." *Id*. Plaintiffs hired Professor Curtis Reitz, a law professor at the University of Pennsylvania, to write a paper explaining the "vesting analysis".

According to this theory, the version of §1961 to be applied is not tied *either* to current law *or* to the law in effect at the date of the judgment chosen to begin the accrual of interest. Instead, the "vesting analysis" looks to an interim date *after* the effective date of amended §1961 for the purpose of establishing what law governs the rate of interest. Plaintiffs refer to this as the "vesting date". Plaintiffs arbitrarily chose December 27, 1984, the date of the Court of Appeals' judgment reversing the district court's judgment n.o.v. and reinstating the December 4, 1981 judgment as their "vesting date." They then calculate the rate using the T-bill rate from August 16, 1979 and apply it to a judgment which did not exist until December 4, 1981. Without any authority, plaintiffs and Professor Reitz have simply concocted a theory

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NOTES *(Continued)*
postjudgment decisions, and the application of amended §1961 defeats Kaiser's reasonable expectations.

which awards them the most interest, at the highest rate, over the longest period of time.

The district court correctly labelled the "vesting analysis" of Professor Reitz "specious". (P.A.45). Perhaps as a result of this, plaintiffs significantly deemphasized the "vesting analysis" before the Court of Appeals and the Opinion of the Court of Appeals does not address it. This Court should reject plaintiffs' attempt to revive the "vesting analysis." It is illogical, convoluted, and not supported by *any* authority. The district court properly found it "inconsisten[t] with case law and the equities of this case" and "not yet adopted by any court. . . ." (P.A.38).

B. This Court's Reasoning In *Bowen v. Georgetown University Hospital* Applies Directly To This Case.

In *Bowen v. Georgetown University Hospital,* 109 S.Ct. 468, 471 (1988), this Court unequivocally and without exception declared that:

> **. . . congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.**

In arguing that a contrary presumption should apply to the construction of amended §1961, plaintiffs vainly attempt to distinguish *Bowen*. They cannot do so, as the petitioner in *Bowen* raised the same arguments as plaintiffs are raising here. This Court rejected those arguments in *Bowen* and should also reject them in this case.

Like plaintiffs here, the petitioner in *Bowen* argued that the hospitals had no *"vested"* rights and, therefore, retroactive application of a statute was warranted. He argued that "the fact that the agency committed a procedural error in its prior endeavor does not confer on anyone a *'vested right'* in any particular regulatory

outcome on remand." Brief For Petitioner in No. 87-1097, at 16. Also like plaintiffs here, the *Bowen* petitioner argued that because the law he sought to apply retroactively was *remedial* or *curative,* retroactive application was justified. He stated that "courts have long upheld similar exercises in 'curative' lawmaking because they do *not* raise any of the problems of inadequate notice generally associated with retroactive rules." *Id.* at 18 (emphasis in original). As plaintiffs do here, he argued that curative acts impair " 'no substantial right or equity. . . .' " *Id. Compare* Pl. Red Brief, at 10-11 ("remedial changes in law should be applied to pending cases . . .").

Furthermore, just as plaintiffs argue here, the petitioner in *Bowen* argued that the hospital's right to reimbursement was not "mature and unconditional" before the new law. The petitioner explained that, although reimbursements had been made prior to the new law, all reimbursements "were expressly made subject to reopening and recoupment in the event of an adjustment in the amount of reimbursement as the result of the adoption of a new wage cost regulation." Reply Brief For Petitioner in No. 87-1097, at 16.[6]

6. In their attempt to distinguish *Bowen,* plaintiffs assert that the hospital's right to reimbursements in *Bowen* "matured and became unconditional" prior to the new law by reason of the district court decision invalidating the 1981 rule. They assert that this decision settled the issue of the amount of the reimbursement. (Pl. Red Brief at 23 n.25). The petitioner in *Bowen,* however, specifically addressed this argument, arguing that the hospital's rights were in no way fixed by the district court's decision:

> . . . that decision did not order the Secretary to pay respondents in accordance with the Secretary's prior 1979 rule; nor did it deny the Secretary any right subsequently to promulgate a retroactive rule on remand. As its terms make clear (*see* Pet. App. 64a), the 1983 order simply invalidated the 1981 rule. It did not finally decide the question of the appropriate standard to be applied in calculating the wage cost reimbursement owed to respondents under the Medicare program. Indeed, the district court specifically refused to issue an order barring the Secretary from applying the 1981 rule to respondents' reimbursement claims, holding that the provisions of the Medicare statute requiring exhaustion of administrative remedies deprived the court of any authority to issue such an order. Hence, the Secretary's decision not to appeal that order did not reinstate the Secretary's prior 1979 rule so as to preclude any subsequent retroactive rulemaking.

Reply Brief For Petitioner in No. 87-1097, at 5.

Bowen is not distinguishable. The Court there rejected the identical arguments plaintiffs are making here. The only difference is that the law in *Bowen* was *explicitly* retroactive and, therefore, the Court did not need to resort to a presumption. Where plaintiffs ask the Court to *imply* retroactivity, the case for prospective-only construction is even stronger as it does not require the Court to invalidate express legislative action.

As in *Bowen,* the Court should adhere to the presumption *against* retroactive laws, confine the application of amended §1961 to the calculation of postjudgment interest on judgments entered after its effective date, and reverse the decision of the court below.

C. This Case Involves Calculation Of Interest On A District Court Judgment.

Although they did not raise it below, before this Court plaintiffs argue that they are seeking postjudgment interest on the December 27, 1984 judgment of the Court of Appeals, rather than on a judgment of the district court. This argument is wholly unmeritorious.

First, it is undisputed that plaintiffs seek interest on a sum of money in the amount of $9,567,939, which Kaiser paid to them on July 3, 1986. Second, it is undisputed that the judgment for $9,567,939 was entered and recovered *in the district court.* Finally, it is undisputed that the December 27, 1984 judgment of the Court of Appeals was *not a money judgment,* as it simply

ordered the district court to reinstate a judgment. Obviously, postjudgment interest may only run on a judgment for a sum of money. The interest plaintiffs seek is interest on the $9,567,939 judgment of the district court, not interest on the judgment of the Court of Appeals.

Despite the seeming obviousness of this conclusion, plaintiffs now wrongly insist that the question in this case is "the issue of appropriate interest on the Court of Appeals' judgment of December 27, 1984." (Pl. Red Brief, at 5).[7]

D. The Court Of Appeals' *Bradley* Analysis Was Flawed.

In its opening brief, Kaiser argued that the traditional presumption *against* retroactive laws should apply here, rather than the approach taken in *Bradley v. Richmond School Board,* 416 U.S. 696 (1974). Even if this Court decides to adhere to *Bradley,* however, the "*Bradley* presumption" that current law applies is displaced in any one of three situations: (1) where there is a fair indication from the legislative history of the law that Congress did not intend the law to apply retroactively; *or* (2) where the statutory terms indicate that Congress did not intend the statute to apply retroactively; *or* (3) where application of current law would result in manifest injustice. Kaiser had shown that the

7. Plaintiffs also incorrectly state that the district court and the Court of Appeals viewed the question as the appropriate interest on a Court of Appeals' judgment. This is wrong. The Court of Appeals expressly applied amended §1961 retroactively, and the district court applied the prior version of §1961, both of which apply to interest on money judgments entered *in the district court.* The Court of Appeals specifically rejected plaintiffs' argument that Rule 37 allowed it to depart from the terms of §1961 with respect to the appropriate interest rate. (P.A.14 n.11).

requirements of all three of these exceptions are satisfied here, and that the Court below erred when it came to the opposite conclusion. Plaintiffs have not refuted this showing.

1. The Statutory Terms And Legislative History Of Amended §1961 Show That It Was Not Intended To Govern Postjudgment Interest Calculations On Judgments Entered Prior To Its Effective Date.

Congress' intent that amended §1961 apply only prospectively to judgments entered after its effective date is shown by the fact that Congress chose to delay the effective date of the statute for six months after its enactment. Plaintiffs have offered no other convincing explanation for this delay.

Plaintiffs have not even attempted to refute Kaiser's showing that the legislative history supports a prospective-only construction of amended §1961. The legislative history indicates that Congress chose to implement the new statute only after a "transition period". S. Rep. No. 275, 97th Cong., 2d Sess. 32, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 42. It shows that Congress had a countervailing interest in protecting the reliance interests of litigants who had made postjudgment and pre-amendment decisions based on the old rates. (P.A.27). Plaintiffs respond by repeating that the purpose of the new postjudgment interest statute was to bring postjudgment interest rates more in line with commercial interest rates. However, there is no inconsistency between the overall purpose of the amendment and an intent that it not apply retroactively to judgments entered prior to its effective date.

2. Application Of Amended §1961 Would Result In Manifest Injustice To Kaiser.

Under *Bradley,* a manifest injustice finding requires consideration of (1) the nature and identity of the

parties; (2) the nature of the rights affected; and (3) the nature of the effect of application of current law on those rights. Plaintiffs have not contradicted Kaiser's showing, pursuant to these three factors, that it will suffer manifest injustice if this Court permits the Court of Appeals' decision to stand.

a. This Case Is Between Private Parties.

In both *Bradley* and *Thorpe v. Housing Authority,* 393 U.S. 268 (1969), the Court applied current law retroactively, relying on the fact that the entities affected by the change in law were *public bodies.* The Court explicitly acknowledged, however, that in cases between *private parties,* courts should "struggle hard" *against* applying intervening changes in law when to do so would affect the rights of a litigant. 416 U.S. at 717 (citing *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801)). This case is indisputably a case between private parties and, accordingly, amended §1961 should not be construed to apply.

Plaintiffs attempt to obfuscate this critical distinction by highlighting their role as "private attorneys general" in bringing this private antitrust action. They claim that their "private attorneys general" role distinguishes this case from an ordinary case, and justifies a more favorable award of postjudgment interest.

Plaintiffs' reasoning fails. This Court rejected a similar position advanced by the petitioners in *Alyeska Pipeline Service Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975). The petitioners in *Alyeska* proposed that in all cases in which a party is acting in the role of a private attorney general, the Court create a wholesale exception to the American rule that litigants bear their own attorneys' fees. In rejecting this proposal, this Court reasoned that:

> *. . . congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule* against nonstatutory allowances to the prevailing party and to award attorneys' fees *whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award* . . . it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant . . .

Id. at 263-64. The Court concluded that courts may not "pick and choose among plaintiffs and the statutes under which they sue and . . . award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Id.* at 269.

This reasoning applies with equal force here. Plaintiffs' role as private-attorneys-general in the merits portion of this lawsuit entitled them to claim treble damages and attorneys' fees. Their attempt to obtain additional procedural advantages without any statutory authorization runs directly contrary to this Court's reasoning in *Alyeska.* The decision of the Court of Appeals accepting plaintiffs' position should be reversed.

b. Kaiser's Rights Should Be Protected: *Bradley* Does Not Require That Application Of Current Law Destroy "Vested Property Rights".

Contrary to plaintiffs' suggestion throughout their brief, this Court has never held that the *Bradley* manifest injustice exception protects only vested property rights. (Pl. Red Brief, at 11, 25-26, 28, 37 and 40). Indeed, this Court in *Bradley* did not even hold that the rights involved must be "mature and unconditional". In *Bradley,* this Court simply articulated three components of the manifest injustice exception, one of which is the nature of the rights affected by application of a newly-enacted law. In evaluating the nature of the School

Board's rights in *Bradley,* the Court observed, by way of illustration, that in the past it "has refused to apply an intervening change [of law] to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." 416 U.S. at 720.

Neither *Bradley* nor *Thorpe* support adoption of the narrow approach to manifest injustice advanced by plaintiffs. In those cases, there were no rights to protect. In *Bradley,* the Court concluded that the complaining party, a publicly-elected School Board, had *no right* in the funds allocated to it by the taxpayers such that it could be unfair to impose on it an additional financial obligation. In *Thorpe,* the Court found that application of the new regulation at issue to the Housing Authority's dealings with the petitioner "not only *does not infringe upon any of its rights,* but also does not even constitute an imposition." *Thorpe,* 393 U.S. at 283. Since there were no rights to protect in *Bradley* or *Thorpe,* neither case turned on whether the disadvantaged party could show destruction or impairment of a "vested property right."

Only one case since *Bradley* has addressed the manifest injustice exception to *Bradley. See Bennett v. New Jersey,* 470 U.S. 632 (1985). Despite the fact that the respondent in *Bennett* argued that the petitioners had no "vested rights," the Court found that the case fell within the manifest injustice exception to *Bradley.* Justice O'Conner simply identified the "fact that the Government's *right to recover* any misused funds preceded the 1978 Amendments. . . ." *Id.* at 639. The right was not characterized as "vested". It was not characterized as "mature". It was not characterized as "unconditional".

Plaintiffs argue that prior to the "final controlling judgment on the merits," which they claim occurred in 1986, Kaiser's rights and obligations were conditional and therefore not protected under the manifest injustice

standard. However, the right identified in *Bennett* was conditional in exactly the same way that plaintiffs claim Kaiser's rights in this case are conditional.

In *Bennett,* pursuant to a federal grant program started in 1970, states were given funds to be used in the public school system. In 1978, the law expanded allowable expenditures under the program. The federal government sought to recover funds it contended were misused in the 1970-72 grant years, pursuant to the regulations in effect prior to 1978. Whether the federal government had a right to recover any misused funds at all, regardless of the law to be applied, was the subject of the underlying litigation in *Bennett.* As here, the "final controlling judgment on the merits," establishing for the first time that the federal government could recover any misused funds, occurred *after* the 1978 change in the law. *See Bell v. New Jersey,* 461 U.S. 773 (1983). The case was then remanded to resolve whether the 1970-72 expenditures should be judged according to the law in effect at the time of the grant, or according to the revised standards enacted in 1978. On remand, the Court of Appeals for the Third Circuit, applying *Bradley,* held that the 1978 change in the law should be applied retroactively.

This Court reversed. The Court found that, prior to 1978, the federal government had rights which justified protection under the "manifest injustice" exception to *Bradley,* even though, according to the theory advanced by the plaintiffs here, the "final controlling judgment" which unconditionally established the existence of those rights occurred in 1985.

This Court's decision in *Bennett* refutes plaintiffs' assertion that a manifest injustice finding requires a showing that application of current law would destroy "vested property rights." *Bennett* also illustrates that Kaiser's rights in this case should be protected. This Court should reject plaintiffs' improper reliance on the notion of "vested property rights," as it is simply a

transparent attempt to tailor the *Bradley* standard to achieve their desired result.

c. Plaintiffs Misconstrue The Impact Of The Change In Law On Kaiser's Rights.

Plaintiffs deliberately misconstrue the inquiry under this third prong of the manifest injustice analysis. The Court in *Bradley* explained that the appropriate question is whether the person affected by the change in law, had he known of the additional or more onerous obligation, might have changed his conduct so as to avoid the new obligation. If so, application of the new law is manifestly unfair and the *Bradley* presumption does not apply. *Bradley* involved the obligation to pay attorneys' fees. Because attorneys' fees are inseparable from litigation of the merits of the claim, the only way to avoid the attorneys' fees obligation would be to alter the underlying conduct and avoid litigation completely.

By contrast, liability for postjudgment interest is completely separable from litigation on the merits and can be avoided by paying the judgment *to the plaintiffs*.[8] Thus, Kaiser made the independent decision to pursue its postjudgment remedies based in part on its consideration of the rate at which postjudgment interest was accruing on the judgment. As the district court found in this case, "Kaiser might have chosen to pay the amount of the judgment earlier had it reason to believe that interest after October 1, 1982 would compound at a rate of more than 6%." (P.A.47).

8. There is no support for plaintiffs' position that paying the judgment *into court* would stop the accrual of postjudgment interest.

CONCLUSION

The decision of the Court of Appeals should be reversed. The "*Bradley* presumption" in favor of retroactivity, which the court below applied in this case, directly conflicts with this Court's recent declaration that, in the absence of specific legislative direction, statutes "will not be construed to have retroactive effect. . . ." *Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468, 471 (1988). In addition, even assuming the applicability of *Bradley* to this case, the court below erred when it failed to recognize that this case fits within all three of the exceptions to the "*Bradley* presumption". Finally, the court below measured interest from the date of a *verdict*, when the applicable federal statute mandates that interest run from "the date of entry of the *judgment*". 28 U.S.C. §1961.

Plaintiffs have refuted none of Kaiser's arguments. They have neither distinguished *Bowen* nor shown that *Bradley* was properly applied. Instead, they have dedicated their entire brief to the concept of "vested rights" – a concept which is not at all pertinent to this case.

Respectfully submitted,

Richard P. McElroy
Counsel of Record
Ann B. Laupheimer

BLANK, ROME, COMISKY
& MCCAULEY
1200 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103
(215) 569-5500

Attorneys For Petitioners

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